

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PIONEER COMMERCIAL FUNDING	:	CIVIL ACTION
CORPORATION,	:	NO. 06-3905
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
RONALD M. NORICK,	:	
	:	
Defendant.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

November 17, 2006

Before the Court is defendant's Motion to Dismiss this Action or, in the Alternative, to Transfer this Action, for Lack of Personal Jurisdiction, for Improper Venue, and for Inconvenient Forum (doc. no. 4). For the reasons that follow, the Court will deny defendant's motion.¹

I. BACKGROUND

Plaintiff Pioneer Commercial Corporation ("Pioneer") brings this action against Ronald M. Norick ("Norick") seeking to enforce a guarantee executed by Norick to secure a principal debt of \$1,721,969.00 owed to Pioneer.

Pioneer is a New York corporation that provides lines of credit to companies that originate residential mortgage loans

¹ The Court decided the motion from the bench on November 15, 2006. This memorandum and order are intended to set forth the basis underlying the decision.

to consumer borrowers. Norick, at all relevant times, served as President of RNG Mortgage Services, Inc. ("RNG"), a California originator of residential mortgages. In May 1997, Pioneer and RNG entered into a Loan and Security Agreement (the "RNG Loan Agreement"), pursuant to which Pioneer provided financing to RNG to originate residential mortgages.

In August 1997, RNG filed for bankruptcy. Norick then contacted American Financial Mortgage Corporation ("AFMC"), a Pennsylvania mortgage originator, seeking assistance in selling loans in the secondary market, as no one would purchase loans directly from RNG. This contact began a series of negotiations in which AFMC agreed to act as a conduit through which RNG could sell closed loans to Norwest Funding, Inc. ("Norwest").

Significantly, Norick came to AFMC's offices in Pennsylvania during the period of negotiations. Moreover, the negotiations ultimately contemplated a merger between RNG and AFMC in Pennsylvania. Norick even negotiated an employment agreement with AFMC to become a part of the merged company.

As part of this new arrangement, Norick introduced Glenda Klein of Pioneer to Harold Seidman of AFMC and requested that Pioneer continue to fund loans originated through RNG with AFMC's assistance. Pioneer acquiesced to this arrangement, but required that Norick execute a Continuing Guaranty (the "Guaranty"). The Guaranty provided that Norick would pay

Pioneer, "on demand, . . . any and all indebtedness and/or obligations" of RNG to Pioneer.

Also as part of this arrangement, RNG requested that Pioneer send two separate loan portfolios to AFMC's offices in Pennsylvania, and AFMC complied with these requests. However, when AFMC forwarded the portfolios to Norwest, Norwest wired payment to AFMC's settlement account at CoreStates Bank, NA ("CoresStates") in Philadelphia, instead of to Pioneer. CoreStates, in turn, used these funds to set off debt that AFMC previously owed. As a result, Pioneer claims, it suffered a loss of \$1,779,519.99.

On May 5, 2005, Pioneer formally demanded that Norick pay the indebtedness remaining under the RNG Loan Agreement. Norick responded by letter through counsel that he refused to pay on the Guaranty. In this suit, Pioneer asserts a single claim for breach of contract to enforce the Guaranty.

II. THE FORUM SELECTION CLAUSE

The centerpiece of Norick's motion is a forum selection clause in the RNG Loan Agreement. Norick first argues that he should be entitled to enforce the forum selection clause against Pioneer, mandating dismissal of this case or its transfer to the Central District of California.

The RNG Loan Agreement provides, in relevant part:

9.4 Jurisdiction and Venue: This Agreement, and any note or other instruments or agreements executed in connection with this Agreement, shall be governed by and construed under the laws of the State of California. The parties agree that all actions or proceedings arising in connection with this Agreement shall be tried and litigated, at the election of the Lender, only in the state courts located in the County of Los Angeles, or the federal courts located in the Central District of California.

RNG Loan Agreement at ¶ 9.4.

Norick is not a party to the RNG Loan Agreement, and the Guaranty that he signed does not contain any forum selection clause. Norick acknowledges this problem, but argues that because he is "closely related" to the RNG Loan Agreement, he is entitled to enforce its forum selection clause against Pioneer.

California courts² recognize that a party may be "so closely related to the contractual relationship" that it is entitled to enforce a forum selection clause to which it is not a signatory. Bancomer v. Superior Court, 44 Cal. App. 4th 1450, 1461 (Cal. Ct. App. 1996). However, it appears this principle is only applied where there is no separate agreement establishing a contractual relationship and spelling out the obligations of each party. See, e.g., Lu v. Dryclean-U.S.A. of California, Inc., 11 Cal. App. 4th 1490 (1992) (court enforced forum selection clause

² Because the Guaranty specifies that California law governs its interpretation, the Court looks to California law to determine whether the RNG Loan Agreement's forum selection clause is enforceable against Pioneer. See GE Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 356 (3d Cir. 1986).

against the corporate parent and grandparent of the signatory to the agreement); Bancomer, 44 Cal. App. 4th at 1461 (applying principle against nonsignatory bank, but holding banks was not "closely related to the contractual relationship").

Here, on the other hand, a separate written agreement exists governing the relationship between Norick and Pioneer. The Guaranty, negotiated five months after the RNG Loan Agreement, contains many negotiated terms, including a choice of law clause. The Guaranty also expressly states that "the obligations hereunder are independent of the obligations of [RNG]." The Guaranty does not contain a forum selection clause, however, and it is an elementary matter of contract interpretation that, where parties did not include a forum selection clause within their express written contract, they did not intend to bind themselves to litigating their disputes in any particular forum. See, e.g., Apra v. Aureguy, 55 Cal. 2d 827, 830 (Cal. 1961) ("It is a general rule governing the construction of contracts that unless a contract is ambiguous, its meaning must be determined from the words used; and courts will not . . . construe into the contract provisions that are not therein.").

Moreover, even if the principle of close relation applied here, notwithstanding the existence of a separate agreement, Norick has not shown that he agreed to be bound by the terms of the RNG Loan Agreement. Bancomer, 44 Cal. App. 4th at

1461 (ruling that party must agree to be bound by terms of contract to be determined "closely related" to contractual relationship). To the contrary, the only terms to which Norick agreed to be bound are contained in the Guaranty, not the RNG Loan Agreement.

Accordingly, the Court will not enforce the forum selection clause contained within the RNG Loan Agreement against Pioneer in this case.

III. PERSONAL JURISDICTION

Norick also contends that this case should be dismissed for lack of personal jurisdiction.

A. Legal Standards

After the defendant has raised a jurisdictional defense, the plaintiff bears the burden of coming forward with enough evidence to establish, with reasonable particularity, sufficient contacts between the defendant and the forum.

Provident National Bank v. California Federal Savings and Loan Assoc., 819 F.2d 434, 437 (3d Cir. 1987). "The plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence TTT at no point may a plaintiff rely on the bare pleadings alone in order to withstand a defendant's Rule 12(b)(2) motion to dismiss

for lack of in personam jurisdiction." Patterson by Patterson v. F.B.I., 893 F.2d 595, 604 (3d Cir. 1990). "Once the motion is made, plaintiff must respond with actual proofs not mere allegations." Id.

Because Pennsylvania's long-arm statute "provides that its reach is coextensive with the limits placed on the states by the federal Constitution," the Court looks to federal constitutional doctrine to determine whether personal jurisdiction exists over Norick. Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Products Co., 75 F.3d 147, 150 (3d Cir. 1996); 42 Pa. C.S.A. § 5322(b). A two-part test is used to consider whether the exercise of personal jurisdiction is permissible under the Constitutional limits: (1) the defendant must have "purposefully established 'minimum contacts' in the State," Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); and (2) the exercise of jurisdiction must be consistent with "traditional notions of fair play and substantial justice." Int'l Shoe Co. v. State of Washington Office of Unemployment Comp. and Placement, 326 U.S. 310, 316 (1945) (internal citations omitted).

B. Minimum Contacts

The Pennsylvania long-arm statute provides for the exercise of general and specific jurisdiction over non-resident

defendants. 42 Pa.C.S.A. § 5301, § 5322. The Court may exercise general jurisdiction over a defendant when the defendant maintains "a continuous and systematic part of its general business within this Commonwealth." 42 Pa.C.S.A. § 5301(2)(iii). Specific jurisdiction is proper when "the plaintiff's 'claim is related to or arises out of the defendant's contacts with the forum.'" Lehigh Coal and Navigation Co. v. Geko-Mayo, GmbH, 56 F.Supp.2d 559, 565 (E.D.Pa.1999) (quoting Mellon Bank (East) PSFS, Nat. Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir.1992)(internal citation omitted)).

Here, Pioneer does not argue that the Court has general jurisdiction over Norick, but rather that Norick's contacts with Pennsylvania are sufficient to support specific personal jurisdiction. Resp. Mot. Dismiss at 16-17. The Court will therefore only address specific jurisdiction.

To determine whether a defendant has had sufficient contact with the forum for the Court to exercise jurisdiction, the Court must inquire whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." Burger King, 471 U.S. at 474 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297(1980)). "[W]here the defendant 'deliberately' has engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of

the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." Id. at 475. (internal citations omitted).

In contract actions, a "highly realistic" approach is required in determining whether a nonresident contracting party is subject to personal jurisdiction, because a "contract is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction. Burger King, 471 U.S. at 478. Where there is a contract involved, the Court must look at the contract, its terms, prior negotiations, and the parties' course of dealing. Id.; Vetrotex, 75 F.3d at 151. Courts should also inquire whether the defendant's contacts with the forum were instrumental in either the formation of the contract or its breach. GE v. Deutz AG, 270 F.3d 144, 150 (3d Cir. 2001).

Here, with hopes of soliciting assistance for his bankrupt company, Norick reached out to AFMC, a Pennsylvania mortgage company, the principals of which were Pennsylvania residents. Norick traveled to Pennsylvania for the express purpose of negotiating the deal that led to the losses at issue

in this case. Norick also initiated numerous telephone calls with AFMC in Pennsylvania to negotiate the deal.

Despite the longstanding relationship between Pioneer and RNG, Pioneer had never before requested that Norick execute a personal guaranty. It required one this time because of the transactions that were to take place in Pennsylvania, including the process by which Pioneer sent RNG loan portfolios to Pennsylvania to be resold to Norwest. Although the parties negotiated and signed the Guaranty at issue in this case in California, and the Guaranty itself designates California law to govern any dispute, the parties' course of dealings throughout the entire transaction show that Pioneer's claim is clearly related to Norick's contacts with Pennsylvania.

In Vetrotex, the Third Circuit held that in contract cases in which the defendant was merely a "passive buyer" of products from the forum state, the exercise of personal jurisdiction would be improper. 75 F.3d at 152. The Third Circuit distinguished such cases from cases where: (1) the "defendant solicited the contract or initiated the business relationship"; (2) the "defendant sent any payments to the plaintiff in the forum state"; or (3) the "defendant engaged in extensive post-sale contacts with the plaintiff in the forum state." Id. at 152-53 (internal citations omitted).

Here, Norick's contacts with Pennsylvania were by no

means "passive." Norick initiated the transaction leading to the loss in this case. Although Norick himself did not send any payments to Pennsylvania, he did request on two occasions that Pioneer send loan portfolios to Pennsylvania. Moreover, the deal that Norick was negotiating contemplated extensive and continuing contacts in Pennsylvania. Indeed, the deal contemplated the sale of Norick's company to and Norick's employment by a Pennsylvania mortgage company. As a result of Norick's minimum contacts, millions of dollars were sent to Pennsylvania and remained in a Pennsylvania bank instead of reaching Pioneer.³

Thus, under the first inquiry, the Court finds that Norick purposefully established "minimum contacts" in Pennsylvania and that those contacts are sufficiently related to the Guaranty giving rise to the claim in this case to support specific personal jurisdiction over Norick.

³ Norick argues that his contacts with Pennsylvania are irrelevant because those contacts were made in Norick's capacity as President of RNG and not as an individual. He cites for support of this argument the Eleventh Circuit case of Club Car, Inc. V. Club Car (Quebec) Import, Inc., 362 F.3d 775, 784 (11th Cir. 2004). In Club Car, the Court held that personal jurisdiction existed in Georgia over a principal and primary shareholder who stood to gain financially as a result of his dealings in Georgia undertaken in his corporate capacity. Id. Here, Norick was a principal and primary shareholder of RNG and stood to gain financially as a result of the merger contemplated between RNG and AFMC. Club Car is not binding on the Court, but even if it was, it would dictate that personal jurisdiction is appropriate.

B. "Fair Play and Substantial Justice"

In deciding whether the exercise of personal jurisdiction in this case would offend due process, the Court must consider: "(1) the burden on the defendant, (2) the forum State's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies and (5) the shared interest of the several states in furthering fundamental substantive social policies." Lehigh Coal, 56 F.Supp.2d at 569 (citing Burger King, 471 U.S. at 477).

Norick contends that litigating this claim in Pennsylvania will place a heavy burden on his finances and his health. Norick claims that he is retired, has little income and no retirement savings, and that it will be difficult for him to pay the increased costs of traveling to Pennsylvania. He also claims that his health is poor, reciting a litany of ailments that would make it difficult for him to travel by air and, due to the distance between Pennsylvania and California, infeasible to travel by car. Despite requests for substantiation of these claimed hardships, however, Norick has submitted nothing other than his own written statement.

Norick also points out that the Guaranty has a choice of law clause specifying that California law governs this

dispute. Although California law will govern, this case involves straightforward commercial principles that the Court will be able to apply.

On the other hand, Pioneer can most conveniently and effectively obtain relief in Pennsylvania, where a significant portion of the events giving rise to the breach of the Guaranty occurred. Moreover, Pennsylvania has a great interest in adjudicating this matter because a substantial portion of the witnesses and facts giving rise to the dispute are in Pennsylvania. It will also be efficient to retain the case here in Pennsylvania, where the Court is already familiar with the case and may promptly bring it to a resolution on its merits.

Accordingly, the Court finds that it would not offend notions of fair play and substantial justice to exercise personal jurisdiction over Norick under these circumstances.

IV. VENUE

Norick also contends that venue in this Court is improper for lack of personal jurisdiction and because of the RNG Loan Agreement's forum selection clause. For the reasons discussed above, the Court finds that personal jurisdiction over Norick exists and that Norick is not entitled to enforce the forum selection clause in the RNG Loan Agreement in this case. Accordingly, the Court holds that venue in the Eastern District

of Pennsylvania is proper.

V. TRANSFER PURSUANT TO 28 U.S.C. § 1404(A)

Norick lastly argues that this case should be transferred to the Central District of California pursuant to 28 U.S.C. § 1404(a).

Section 1404(a) provides for a case to be transferred in the interest of justice to any other district or division where it might have been brought "for the convenience of parties and witnesses." A § 1404(a) analysis includes an assessment of the public and private interests involved in the choice of forum. The private interests to be considered may include: (a) the plaintiff's forum preference; (b) the defendant's preference; (c) where the claim arose; (d) the convenience of the parties; (e) the convenience of the witnesses to the extent the witnesses may be unavailable in one of the fora; and (f) the location of necessary books and records. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). The public interests to be considered may include: (a) the enforceability of the judgment; (b) practical considerations; (c) the administrative difficulty in each fora resulting from court congestion; (d) the local interest; (e) the public policies of the fora; and (f) the familiarity of the trial judge with the applicable law. Id. Although the plaintiff's choice of forum should not be lightly

disregarded, the Third Circuit has emphasized that "there is no definite formula or list of the factors to consider." Id.

The burden to establish the need for transfer is on the moving party. See id. at 879. While it is true that ordinarily, "unless the balance of convenience of the parties is strongly in favor of defendant, the plaintiff's choice of forum should prevail," see Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d. Cir. 1970) (citations omitted), cert. denied, 401 U.S. 910 (1971), such choice is entitled to less deference when neither plaintiff resides in the forum district nor did any of the events occur there. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.23 (1981).

With regards to the private factors, Norick prefers that the litigation take place in California. As discussed above, he claims that litigating this action in Pennsylvania will pose a severe burden on both his finances and his health, but he has not substantiated these claims. Norick also points to two additional witnesses who reside in California. Both of these witnesses are former RNG employees with knowledge of RNG's dealings with Pioneer regarding the RNG loans sent to Pennsylvania.

Pioneer, on the other hand, contends that its claim for breach of contract arises out of Norick's dealings with AFMC in Pennsylvania. Pioneer points out that the litigation that ensued

between Pioneer, CoreStates, and AFMC, two Pennsylvania entities, took place in and was decided by Pennsylvania courts. Pioneer maintains that these events form the basis of Pioneer's right to demand that RNG pay its loans and that Norick honor the terms of his Guaranty. Pioneer also maintains that litigating this action in Pennsylvania will be more convenient as several witnesses from both AFMC and CoreStates are domiciled in Pennsylvania, and all court documents and records from prior litigation are located in Pennsylvania. In addition, witnesses from Pioneer are currently located in New York, which is closer to Pennsylvania than California. Under these circumstances, the scales do not tip in favor of transfer to the Central District of Pennsylvania.

Moreover, turning to the public factors, the Eastern District of Pennsylvania will be able to provide a speedier forum than the Central District of California, and Pennsylvania has a great interest in adjudicating this matter because a substantial portion of the events giving rise to the dispute took place in Pennsylvania.⁴

Accordingly, the Court finds that grant Norick has not met his burden of establishing the need for a transfer in this case.

⁴ Although the RNG Loan Agreement calls for application of California law, the issues before the Court involve straightforward commercial principles that do not require particular expertise or experience in California law to be applied by the Court.

VI. CONCLUSION

For the foregoing reasons, the Court will deny Norick's Motion to Dismiss this Action or, in the Alternative, to Transfer this Action, for Lack of Personal Jurisdiction, for Improper Venue, and for Inconvenient Forum.

An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PIONEER COMMERCIAL FUNDING	:	CIVIL ACTION
CORPORATION,	:	NO. 06-3905
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
RONALD M. NORICK,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this **17th** day of **November, 2006**, it is hereby **ORDERED** that Defendant's Motion to Dismiss or, in the Alternative, Transfer for Lack of Personal Jurisdiction, for Improper Venue, and for Inconvenient Forum (doc. no. 4) is **DENIED**.

AND IT IS SO ORDERED.

S/Eduardo C. Robreno

EDUARDO C. ROBRENO, J.